**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **DAVID L. MCNUTT** | ) | |
| Claimant | ) | |
| | ) | |
| VS. | ) | |
| | ) | |
| **WEIS BUILDERS** | ) | |
| Respondent | ) | Docket No. 1,002,326 |
| | ) | |
| AND | ) | |
| | ) | |
| **TRANSCONTINENTAL INSURANCE CO.** | ) | |
| Insurance Carrier | ) | |

## ORDER

Respondent and its insurance carrier request review of the June 7, 2004 Post-Award Medical Award by Special Administrative Law Judge Vincent L. Bogart. This is a post-award proceeding for medical benefits. Both parties submitted briefs and the case was placed on the Board's summary docket on July 20, 2004, for decision without oral argument.

### APPEARANCES

Robert R. Lee of Wichita, Kansas, appeared for the claimant. D. Steven Marsh of Wichita, Kansas, appeared for respondent and its insurance carrier.

### RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

### ISSUES

This is a post award proceeding for additional medical treatment. The Special Administrative Law Judge (SALJ) found the claimant's need for medical treatment was causally related to the September 15, 2000 work-related accident claimant suffered while working for respondent.

The respondent requests review of whether the claimant's current need for medical treatment is related to the injury which was the subject of the underlying award. Respondent argues claimant has worked for a different employer since October 2001, and claimant's current need for medical treatment is caused by an aggravation of his pre-existing condition while working for his present employer.

Claimant argues that he has a non-physical job at his present employment, does not engage in activities which exceed his permanent restrictions, and has not suffered any intervening accidents. Claimant notes his present job merely requires him to walk which is an activity of every day life. Consequently, claimant argues the SALJ's Post-Award Medical Award should be affirmed. In addition, claimant requests an additional $225 in attorney's fees for 1.5 hours of additional time spent.[1]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The claimant injured his right knee on September 15, 2000, when dismounting from the platform of an all-terrain lift while working for respondent. On February 21, 2001, Dr. Bradley W. Bruner performed an arthroscopic partial medial meniscectomy on claimant's right knee. The doctor apparently performed a second surgery on the medial meniscus on claimant's right knee on February 19, 2003.[2]

Claimant quit working for respondent on October 17, 2001, and three days later began employment with Key Construction as a project superintendent. Claimant testified he is required to do a lot more walking in his job with Key Construction than his employment with respondent. And he is required to walk not only on concrete but also on uneven ground. Claimant further testified he is on his feet six to eight hours a day and walking causes pain in his knee. Lastly, claimant noted that the knee pain worsens during the work week.

Claimant agreed that after the second knee surgery his knee condition improved but it is now worse than it was after that surgery. It is significant to note that claimant agreed the walking he does aggravates his condition. Claimant testified:

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[1] Claimant's brief does not itemize the requested additional 1.5 hours of attorney time. Instead there is just a request for fees for additional time spent. Because the SALJ awarded claimant's attorney all the fees requested for time spent for the post-award hearing it appears the request for additional fees would likely relate to time spent preparing the brief for the Board review.

[2] P.A.H. Trans., at 12.

> Q. Did you have some improvement in your condition after Doctor Bruner did his second surgery?
>
> A. I think after the second surgery it felt better, yes.
>
> Q. Is it worse now than it was after you noticed the improvement following the second surgery?
>
> A. Yes.
>
> Q. Have you filed a claim against Key Construction, a workers' compensation claim?
>
> A. No.
>
> Q. But you believe, don't you, that the walking that you are doing is causing your condition to be aggravated?
>
> A. Aggravated, yes, sir; I do.[3]

K.S.A. 44-510k (Furse 2000) provides further medical care for a work-related injury can be ordered based upon a finding such care is necessary to cure or relieve the effects of the injury which was the subject of the underlying award.

The controlling issue is whether claimant's present need for medical treatment is directly and naturally related to the September 15, 2000 accident.

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*[4], the Court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury. (Syllabus 1.)

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman*, the Court attempted to clarify the rule:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in

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[3] Id. at 17.

[4] *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

> the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.[5]

In general, the question of whether the worsening of claimant's preexisting condition is compensable as a new, separate and distinct accidental injury under workers compensation turns on whether claimant's subsequent work activities aggravated, accelerated or intensified the underlying disease or affliction.[6]

No medical evidence was proffered to establish causation for claimant's current knee condition. The absence of medical evidence makes it impossible to establish medical causation, based on this record, regarding whether claimant's condition is a natural and probable consequence of his September 15, 2000 work-related accident, or a subsequent aggravation, acceleration or intensification of his condition caused by his current work duties. The claimant's knee condition could also be the result of disease and totally unrelated to claimant's past or present work activities.

Claimant has the burden of proof to establish that his medical condition is a direct and probable consequence of the original work-related injury. The record presented at the post-award hearing is deficient in this regard. There is no expert medical testimony post dating the entry of the Award and, consequently, no physician's opinion that claimant's present knee condition and need for treatment is a direct and natural consequence of the work-related injury established in the underlying Award.

Because claimant has failed to meet his burden of proving that the treatment he is seeking is a natural consequence of the work-related injury, the request for additional medical treatment for his knee must be denied.

Moreover, the facts do establish that walking at work for the claimant's present employer has, at a minimum, aggravated the claimant's preexisting knee condition. Claimant's uncontroverted testimony establishes that fact.

At the hearing on claimant's request for post-award medical treatment, the claimant offered an exhibit which listed Dr. Bruner's permanent work restrictions. The SALJ admitted the exhibit over respondent's objection that such medical record was not admissible unless the doctor testified. The Board agrees and sustains respondent's objection to the proffered exhibit.

The exhibit is not admissible pursuant to K.S.A. 44-519. That statute provides:

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[5] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

[6] *Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, *rev. denied 265* Kan. 884 (1998).

> No report of any examination of any employee by a health care provider, as provided for in the workers compensation act and no certificate issued or given by the health care provider making such examination, shall be competent evidence in any proceeding for the determining or collection of compensation unless supported by the testimony of such health care provider, if this testimony is admissible, and shall not be competent evidence in any case where testimony of such health care provider is not admissible.

Here, respondent timely objected to the exhibit. Therefore, because Dr. Bruner did not testify and the parties did not stipulate or otherwise agree to admit the exhibit, K.S.A. 44-519 prevents the exhibit from being entered into the evidentiary record.

Lastly, in claimant's brief to the Board, claimant's attorney requested additional attorney fees. As previously noted, it is assumed the time was spent preparing the brief for the Board review but no explanation or itemization was provided. K.S.A. 44-536(h) provides that disputes regarding attorney fees are to be addressed first by the ALJ. This would include the request for additional attorney fees in connection with this review if that is, in fact, why the additional attorney time is claimed. Accordingly, the request for additional attorney fees is remanded to the SALJ for further proceedings, if necessary, regarding the request for additional attorney fees.

## AWARD

**WHEREFORE**, it is the finding, decision and order of the Board that the Post-Award Medical Award of Special Administrative Law Judge Vincent A. Bogart dated June 7, 2004, is affirmed as to attorney fees and otherwise reversed. Claimant's request for additional medical treatment is denied. Claimant's attorney's request for additional attorney fees is remanded for further proceedings, if necessary.

**IT IS SO ORDERED.**

Dated this _____ day of July 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant
D. Steven Marsh, Attorney for Respondent and its Insurance Carrier
Jon L. Frobish, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director